Justices CLIFFORD, DAVIS, and FIELD dissented from the judgment rendered, and were of opinion that only so much of the judgment of the Circuit Court should be reversed as confirmed the sale made under the decree of the District Court.

KNAPP *v.* RAILROAD COMPANY.

1. In determining a question whether a Circuit Court had erred in denying a motion to remand a case removed to it from the State court, and giving judgment as if the case had been rightly removed to it, this court cannot pay any attention to a certificate of the clerk of such Circuit Court, certifying that on the hearing of the motion in the Circuit Court certain things "appeared," "were proved," or "were admitted," or "agreed to" by the parties respectively; such facts not appearing by bill of exception nor by any case stated. Neither party can gain any advantage by such a statement.
2. The act of Congress of March 2d, 1867, allowing either of the parties to a suit—they being of a certain class described—to remove it from a State court into the Circuit Court of the United States, does not change the previously existing and settled rules which determine who are to be regarded as the plaintiff and defendant.
3. Hence, where two persons in one State, trustees, for bondholders, of a mortgage of a railroad owned by a company in another, foreclosed the mortgage, bought in the road in trust for the bondholders, and then leased it to a citizen of the State to which they themselves belonged, and then a majority of the bondholders in the State where the original company was, in pursuance of a statute there, formed themselves into a new corporation, to which the statute gave ownership and control of the road, and suit was brought in a State court against the lessee of the road by the trustees who had made the lease; *held*, that the defendant could not remove the suit from the State court to the Federal court on the ground that it was wholly between the new corporation and the lessee, and that the trustees were now merely nominal parties; they, the trustees, not having been discharged from, or in any way incapacitated from executing their trust, and there having been, in fact, unpaid bondholders who had not joined in the creation of the new corporation, and who had yet a right to call on the trustees to provide for the payment of their bonds.

ERROR to the Circuit Court for the District of Vermont; the only question in the case being whether the suit originally brought in a State court (the County Court for the

County of Bennington), had been rightly removed to the Circuit Court, in pursuance of the act of Congress of March 2d, 1867;* one enactment of which is as follows:

"That where a suit is now pending, or may hereafter be brought in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of $500, exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, if he will make and file, in such State court, an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court, may, at any time before the final hearing or trial of the suit, file a petition in such State court for the removal of the suit into the next Circuit Court of the United States, to be held in the district where the suit is pending," &c.

The case was thus:

The Western Vermont Railroad Company, a corporation of Vermont, having issued a large amount of bonds, made a mortgage of the road to Knapp and Briggs, both citizens of New York, in order to secure the payment. By a foreclosure, in regular equity form, of that mortgage under the laws of Vermont, the title of Knapp and Briggs to the railroad became absolute in fee, in trust for the bondholders under the mortgage. They thereupon leased the railroad for a term of years to the Troy and Boston Railroad, a corporation of New York; and, therefore, according to the decisions of this court, a citizen of the same State with Knapp and Briggs. The lease contained various covenants.

In the meantime, and before the expiration of the lease, a new corporation, called the Bennington and Rutland Railroad Company, had been organized by a *majority* of the bondholders, in pursuance, as was said, of certain provisions of a railway act of Vermont. That act, as the new corporation conceived, authorized the *majority* of the bondholders of any railroad company purchasing the road under a foreclosure,

* 14 Stat. at Large, 558.

to form a new corporation, which would own, maintain, and work the purchased railroad.* It vested the company thus formed with all the powers, privileges, and franchises of the original corporation, and empowered it "to proceed in any manner it may deem expedient, either by purchase or otherwise, to obtain the title and ownership, or the use and benefit of the whole estate, and to satisfy the undivided interest or claims of any other party or parties interested in said railroad; and until the interests of such other parties shall become vested in such new corporation, such corporation shall be the trustees thereof, and shall be accountable therefor as tenants in common."

By an act passed November 18th, 1864, the corporation formed under the foregoing provisions was declared entitled to receive rents accruing under leases executed by the trustees who foreclosed.

In this state of things, Knapp and Briggs sued the Troy and Boston Railroad Company, on the covenants already mentioned of their lease to them. The defendants—alleging that the new corporation was, by the provision of the statute under which it was formed, substituted as trustee of the other bondholders, in place of Knapp and Briggs, and had thus become the real party in this suit, and filing such affidavit of local prejudice as the act of March 2d, 1867, requires—asked the State court, in a petition addressed to it, to remove the cause into the Circuit Court. They contended that the subject-matter of the controversy was wholly between the Bennington and Rutland Railroad Company, a Vermont corporation, and themselves, and that Knapp and Briggs were now but nominal parties to it, having no interest in it.

The petition, with the affidavit annexed to it, together with the original writ, declaration, and pleas, were transmitted to the Circuit Court. The plaintiffs, upon these papers, the certified copy of the lease, and the affidavits of certain persons that there were outstanding bonds of the

* Laws 1862, chap. 28, §§ 104, 108.

Western Vermont Railroad, which had not been converted into or exchanged for the stock of the Bennington and Rutland Railroad Company, nor in any other way paid or discharged, moved the Circuit Court to remand the cause to the State court for want of jurisdiction. This motion the Circuit Court denied, and proceeded to hear and adjudge the case; and after suit gave judgment for the company. The plaintiff, Knapp, thereupon (Briggs having died) took this writ of error.

The transcript of the record, as it came to this court, presented in regular form the papers on which the order for removal was founded, and those filed in support of the motion to remand. It contained, in addition, a statement by the clerk of the court below (not authenticated in any way by the judge, nor appearing in a bill of exceptions), occupying three pages of the transcript, of a number of things which according to the statement "appeared" or "were proved" on the hearing of the motion, and of different things that were "admitted" or "agreed to" by the parties respectively. One part of the certificate was thus:

"It further appeared that said Knapp and Briggs had no interest, directly or indirectly, in the commencement or prosecution of this suit; that they had no control whatever over it; paid no part of the expenses of its prosecution; had employed no counsel; and that said suit was prosecuted solely by, and for the benefit of, said Bennington and Rutland Railroad Company, and at its expense; and that the said Bennington and Rutland Railroad Company had indemnified the said Knapp and Briggs against any liability growing out of said suit. And that Knapp and Briggs did not know that said suit was to be brought until after the writ had been served.

"It was admitted by both the plaintiffs and defendants that the said Bennington and Rutland Railroad Company was organized under the same laws of the State of Vermont; that said organization was valid and legal; and that thereby said Bennington and Rutland Railroad Company became the trustees of such bondholders as had not converted their bonds into the stock of said Bennington and Rutland Railroad Company; and of the interests and claims of all other parties in said railroad.

"And it was admitted by the plaintiffs that this suit was brought in their names because, as the plaintiffs claimed under the laws of the State of Vermont, and the rules of pleading then in force in that State, it was necessary so to commence the same in order to recover on said covenant, as no action upon a covenant can be maintained in that State in the name of any other person than the covenantor, unless where the covenant is, in terms, assignable, and runs with land, and has been duly assigned by the warrantee deed of the covenantor conveying the premises to which the covenant applies."

Messrs. L. P. Poland and E. J. Phelps, for the plaintiffs in error; Mr. W. J. Beach, contra.

Mr. Justice DAVIS delivered the opinion of the court.

In the consideration of the question whether or not the Circuit Court had the right to try the case, we are confined to the papers sent up with the order for removal and the papers filed in support of the motion to remand. If anything occurred on the hearing of this motion, which ought to have been preserved, it has not been done, for there is neither a bill of exceptions nor an agreed case in the record. It is true, the clerk makes a recital, running through nearly three pages of the transcript, of the various matters which, he says, were proved on the hearing of this motion, and of certain stipulations and admissions. These recitals form no part of the record and cannot be considered by us. They are not even authenticated by the signature of the judge, nor could they be, to be made available here, except through the mode of a bill of exceptions.

Although this manner of making entries by the clerk is improper and unauthorized, yet the party to the record in whose favor they are made cannot gain by them, or the party against whom they are made be injured by them. If either party, in an action at law, is desirous of preserving the evidence, either at the trial or on a preliminary motion, in order to raise a question of law upon it, he must ask to have it incorporated in a bill of exceptions. This is the only way in which it can be done, unless the parties choose

to make an agreed statement of facts. Neither mode was adopted in this case, and we are, therefore, without the means of knowing what evidence was introduced on either side on the motion to remand. The question of jurisdiction is, therefore, to be decided on the papers properly in the record.

The motion of the plaintiffs to remand the case to the State court was denied, and the Circuit Court rested its decision on the ground that Knapp, the surviving plaintiff, was only a nominal party to the suit. But it is difficult to see how a party who makes a contract and is charged with duties and responsibilities in connection with it can be treated, when he sues for the breach of it, otherwise than as the real plaintiff. In a court of law legal rights alone can be recognized, and in determining the point of jurisdiction, we will not make inquiry outside of the case in order to ascertain whether some other person may not have an equitable interest in the cause of action.

It is conceded on the argument that Knapp and Briggs were trustees of a mortgage upon the property of the Western Vermont Railroad to secure the bonds of the company, and that upon a strict foreclosure of the mortgage their title became absolute in trust for the bondholders. After this they leased the road to the defendants for a term of years, and at the expiration of the lease brought their suit upon the covenants of the lease. It would seem that they not only had the right to sue, but that nobody else could sue. It is said, however, that before the expiration of the lease a new corporation, called the Bennington and Rutland Railroad Company, was organized by a majority of the bondholders of the defunct corporation, under the laws of Vermont, who had converted their bonds into stock, and that the new corporation was, by the provision of the statute under which it was formed, substituted as trustee for the other bondholders in place of the plaintiff in error, and had thus become the real party in this suit. It is not necessary to discuss the question whether the statute of Vermont can bear the construction claimed for it, for manifestly it is not

in the power of the State legislature, without the consent of the *cestuis que trust*, to substitute a new trustee in place of the persons named in the mortgage. This would impair the obligation of the contract. The salability of railroad bonds depends in no inconsiderable degree upon the character of the persons who are selected to manage the trust. If these persons are of well-known integrity and pecuniary ability the bonds are more readily sold than if this were not the case. It is natural that it should be so, and on this account the trustees usually appointed in this class of mortgages are persons of good reputation in the cities where these bonds are likely to sell. To change them is to change the contract in an important particular, and this cannot be done without the consent of the parties for whose benefit the trust was created.

The trustees in this case, so far as the record discloses, have not been discharged from the obligations of their trust or divested of their right of action on this lease by judicial proceeding or otherwise, nor has the trust in fact been closed, for there are bonds outstanding which have never been paid or converted into stock of the new corporation. It can make no difference whether these bonds are few or many. The trust is continued until all are paid, unless in the meantime the trustees are discharged.

They are the real plaintiffs in any suit brought to enforce a claim accruing to them in the execution of their trust, as much so as executors and administrators are, who also sue for the benefit of others and not themselves. Like them they control the litigation, and are charged with the responsibility of conducting it. The true line of distinction between nominal and real parties to an action is pointed out by this court in the recent case of *Coal Company* v. *Blatchford.** The court, in commenting on the cases of *Browne* v. *Strode*† and *McNutt* v. *Bland*,‡ where the plaintiffs of record were treated as nominal parties merely, say, "There is no analogy between those cases and the case at bar (one of trusteeship). The nominal plaintiffs in those cases were not

* 11 Wallace, 172. † 5 Cranch, 303. ‡ 2 Howard, 9.

trustees, and held nothing for the use or benefit of the real parties in interest. They could not, as is said in *McNutt* v. *Bland*, prevent the institution or prosecution of the actions, or exercise any control over them. The justices of the peace in the one case and the governor in the other were the mere conduits through whom the law afforded a remedy to the parties aggrieved."

The position of Knapp as surviving plaintiff is very different. He is not a mere passive instrument in the litigation. On the contrary, he is active in promoting it, and would be remiss in his duty if he failed in using all proper means to bring it to a successful issue. As the cause of action is vested in him the court looks to his citizenship in determining the question of jurisdiction, and not to the residence of those persons who are beneficially interested in the subject-matter of the litigation. The cases are numerous to this point, and it would be a needless work to cite all of them.*

It may be proper to say that the act of 1867, on the subject of the removal of cases from the State to the Federal courts, which extends the provisions of the act of 1789, so as to allow either the plaintiff or defendant to remove the cause for the reasons stated, at any time before final judgment, does not change the settled rule that determines who are to be regarded as the plaintiff and the defendant. As the plaintiff and the defendant in this action were both citizens of New York, the Circuit Court had no jurisdiction to entertain it.

JUDGMENT REVERSED, with instructions to the Circuit Court to remand the case to the County Court for the County of Bennington, in the State of Vermont, from whence it was improperly removed to the Circuit Court.

Mr. Justice BRADLEY did not sit during the argument, and took no part in this decision.

* Bornafee *v.* Williams, 3 Howard, 574; Davis *v.* Gray, 16 Wallace, 220; Coal Co. *v.* Blatchford, *supra*.